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No. 278

In the Supreme Court of the United States

October Term, 1942

EDWIN L. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 273

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion (R. 217–232), concurring opinion (R. 233), and dissenting opinion (R. 233–241) in the circuit court of appeals are reported at 129 F. (2d) 954. The oral opinion of the district court denying a motion for a new trial (R. 200–202) is unreported.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 30, 1942 (R. 242). The petition for a writ of certiorari was filed on July 31, 1942, and was granted October 12, 1942 (R. 244–

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245). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether it was error to permit cross-examination of petitioner concerning his receipt of money from the numbers syndicate in 1938 and his practice in accounting therefor.

2. Whether petitioner was entitled to hear argument to the court upon the propriety of the questions being asked him on cross-examination, and whether the procedure adopted for that purpose denied him opportunity to consult with his attorneys concerning what occurred before resuming the witness stand.

3. Whether it was error to permit the jury to consider, in determining petitioner's credibility, his refusal, after taking the stand, to answer relevant questions on the ground that the answers would tend to incriminate him of another crime.

4. Whether petitioner should be granted a new trial for any error in the procedure followed during his cross-examination or in the charge concerning his claim of privilege, notwithstanding his complete acquiescence at the trial.

STATEMENT

Petitioner was indicted in the District Court for the District of New Jersey in an indictment containing three counts charging him with wilfully attempting to defeat and evade his income

taxes for the calendar years 1935, 1936, and 1937 in violation of Section 145 of the Revenue Acts of 1934 and 1936 (R. 5–15).[1] He was acquitted for 1935 but was convicted on the second and third counts for 1936 and 1937 (R. 4). He was sentenced to five years' imprisonment and fined $10,000 on each count, the sentences to run consecutively (R. 202–203).

Although petitioner has at no time suggested that the verdict was unwarranted, it is important to summarize the evidence in the case because it is directly relevant to the errors urged.

The theory of the Government's case on the second and third counts was that petitioner, Johnson, who, throughout the period, was the leader of the dominant political party in Atlantic City and Atlantic County, New Jersey (R. 95), had received large sums of money from those conducting the numbers game for protection against police interference, and had not reported these sums for

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[1] Revenue Act of 1936, c. 690, 49 Stat. 1648; provides in part:

"SEC. 145. PENALTIES.

* * * * * * *

"(b) * * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

There is no question in this litigation involving interpretation of this section.

income-tax purposes. The Government's evidence was as follows:

Prior to 1935 the numbers game had been operating in Atlantic City through several independent banks. One of the numbers backers, Weloff, testified that beginning in 1933 or 1934 he began to deliver weekly payments to petitioner on behalf of the various numbers banks for protection. On making the first payment he told petitioner that the numbers backers wanted to go along without being molested by the police and wanted to keep outsiders from getting into the business. Petitioner replied, "I understand the situation and I think it will be all right." These payments, $125 by each day bank and later an additional $75 by the night bank, continued until May 1935 and during most of the period totalled $825 weekly (R. 37–38; see also R. 77–78).

In May 1935 the numbers bank in which Weloff and one Towhey were partners split up and a competitive price war ensued, stopping the protection payments (R. 41–43). Weloff asked petitioner to intercede (R. 42) and petitioner called Towhey, but Towhey refused to settle his differences with Weloff (R. 78–79). Finally, late in June of 1935 the numbers backers met and agreed to pool their operations (R. 43–45, 79–84).

Thereafter, until 1939, the numbers game thus operated as a single syndicate, the gross business of which averaged $1,800,000 a year (R. 32, 43–44,

79–81, 83, 85; Tr. 822–823, 973–975). Shortly after the formation of the syndicate, Weloff and Towhey, acting alternately began to deliver on behalf of the syndicate weekly payments of $1,200 to petitioner for protection; $150 a week was paid by each bank (R. 46–47, 81–82, 90). When the arrangement was explained to Johnson, he said that he was pleased that the numbers backers had gotten together and that it was all right with him as long as they eliminated all trouble among themselves and could meet the obligation of $1,200 a week (R. 46–47, 81–82, 90). During the same period the syndicate made additional yearly contributions to petitioner for election campaign expenses of $1,500 (R. 50). Johnson asked Weloff for these contributions (R. 50).

Weekly protection payments of $1,200 were made through 1937 and 1938 (R. 33–34, 59), but in November 1937 the numbers backers relieved Weloff and Towhey of the task of delivering the weekly payments and gave it to another member of the syndicate named Martin Michael, called Jack Southern (R. 33–34, 48–49, 86–87). The Court called Southern as a witness. Neither party would vouch for him (R. 61). He denied that he ever made any weekly payments to Johnson. He admitted that he knew that the protection payments had been made by the syndicate and that a meeting was held in the fall of 1937 at which it had been decided that he would

handle the payments rather than Weloff or Towhey. He stated that he did not know to whom the payments were being made at that time and that there was no discussion of this at the meeting. According to his testimony, a day or so after the meeting he was called to the office of an inspector of police named Ferretti and told by Ferretti to bring the money to him. He said that thereafter he made the weekly payments to Ferretti. Ferretti was dead at the time of the trial. (R. 61–71.)

The amounts of income received by petitioner from the protection payments greatly exceeded the sums included in his returns. His defense was that his omission to return all the income resulted from the mistaken but sincere belief that he was obliged to return only the net balance appropriated to his own use after deducting amounts expended for political purposes.

Petitioner took the stand in support of this defense and testified that the numbers money was paid to him for political purposes alone (R. 98). He said that he regularly expended moneys received from the numbers game for the expenses of his personal political organization, that he noted on memoranda slips the balances remaining after such expenditures and sent the slips to his secretary for safekeeping, that when he prepared his income tax returns these slips were totalled and the totals were reported on his returns as "Commissions" and that consequently the items so designated on his 1935, 1936, and 1937 income tax returns repre-

sented the balance of numbers money after deduction of political expenditures, and were the only amounts which he had believed subject to tax (R. 100–109). His direct examination as to this system, however, was carefully limited to the period prior to November 1, 1937. He admitted that he had received the weekly payments from Weloff and Towhey up to that date (R. 96–98), but he did not say whether he had received payments from the syndicate after November 1, 1937, when Southern was delivering the money.

On cross-examination petitioner was questioned concerning the extent of his practice of recording income and expenditures on memoranda slips. It was brought out that he applied the system only to the weekly numbers payments and not to the political contributions made once a year (R. 122, 130). Petitioner also testified, after objections were overruled, that he followed the same system in 1938 (R. 126). Still over objection, he answered that he had received numbers money in 1938, although he categorically denied that he had received payments in November and December 1937 (R. 129, 131). When asked who paid him the numbers money in 1938, he claimed his privilege against self-incrimination and the answer was not compelled (R. 140). He also claimed privilege in response to a request that he state what money was represented by the item "Other Commissions" in his 1938 return, which paralled the item "Com-

missions" in his returns for the three previous years (R. 143). One of petitioner's contentions is that the Court erred in permitting these questions to be asked.[2]

During this sequence of questions petitioner's attorney objected and asked for an opportunity to argue in the absence of the jury his objection that the questions were improper. The prosecutor then requested that since the jury was not to be present the petitioner should also be excused and that he should resume the stand without having an opportunity to hear what the argument was about. The court stated that this was a fair request and directed the petitioner to retire. He withdrew without objection by himself or on his behalf. After hearing argument, the court ruled that the cross-examination was proper to test the petitioner's credibility, but that his attorney could advise him of his right to claim the privilege against self-incrimination. Counsel did so advise him. (R. 131–139.) Petitioner contends that he was deprived of his constitutional rights by this incident, and that he is therefore entitled to a reversal. He made no such suggestion at the time.

During the latter part of the petitioner's cross-examination he testified that all of his political activities during the three years in question were financed out of the numbers money. When asked

[2] The relevant facts with regard to this cross-examination and the issue arising out of it are set forth in detail, pp. 19-25 *infra*. Consequently, they are only summarized here.

again what moneys he used for these expenses after the payments stopped in November 1937, he replied that they were paid out of accumulated funds. He further said that he did not know why the money stopped in November and that he had not tried to find out (R. 148–149). In response to questions by the court he admitted that he had made no study of the income tax law, that he had not asked his accountant whether the political expenses were deductible and that he had never given a thought to whether they were deductible. He said that he knew some deductions were allowable and that he based his belief that the political expenses were deductible upon general information and not upon any examination of the income tax law, consultation with anyone or anything he had read or heard (R. 153, 157–158).

The testimony of petitioner's secretary and of the accountant who prepared the returns tended to corroborate petitioner's story of recording items of income on memoranda slips and of totalling them to reach the amount listed as "Commissions" on the income tax returns. Neither had been told what the source of this item was, although they had detailed information as to his other items of income and deductions. The Government had called these witnesses, and claimed surprise. It was allowed to impeach their testimony concerning the preparation of the returns by the introduction of the testimony given by them before the grand

jury, which was in direct conflict with their testimony at the trial (R. 15–31).

In summation, counsel for the Government commented on petitioner's claim of privilege, urging that the refusal to give relevant testimony showed that petitioner's evidence could not be believed (R. 167–168). The trial court charged that the claim of privilege could be considered by the jury only in testing petitioner's credibility and his good faith (R. 173–174). Although he took no exception when the charge was delivered, petitioner now urges that this instruction was prejudicial error.

The circuit court of appeals affirmed the conviction (R. 242). The prevailing opinion held that the cross-examination of the petitioner as to 1938 was proper, that the trial court did not commit error in excluding the petitioner from the court room, and that no error was committed by the trial court in charging that the jury might consider the petitioner's claim of privilege in testing his credibility and good faith (R. 217–232). Judge Goodrich who concurred in the opinion of the court on the other issues, filed a separate concurring opinion on the issue of the petitioner's presence (R. 233). Judge Jones dissented (R. 233–241).

SUMMARY OF ARGUMENT

I

It was not error to permit petitioner to be questioned on cross-examination concerning his

receipt of numbers money in 1938 and his practice in accounting for it. Petitioner had testified on direct examination that he had received weekly payments from the numbers syndicate until November 1, 1937 and that he had included the balance remaining after political expenditures under the heading "Commissions" in his return. By implication he had denied receiving numbers money in November or December 1937. The questions concerning 1938 elicited proof that that denial was untrue because the answers established that in 1938, just as before November 1937, petitioner received weekly numbers payments. Other evidence showed that the syndicate disbursed the regular weekly sums in November and December also. Hence, in the absence of any explanation to the contrary, it was a fair inference from the proof showing an established practice continuing after 1937 that petitioner, notwithstanding his denial, had in fact received the payments during those two months. The questions were therefore relevant and material. That being true, they were not rendered incompetent by the possibility that the answers would show petitioner to be guilty of evading his income tax in 1938, a year not covered by the indictment. It is settled law that questions otherwise proper do not become improper merely because they tend to show that the defendant is also guilty of other crimes.

II

It was not error to hear argument in petitioner's absence on the objection to the cross-examination. The objection came at a critical point and argument upon it would call for the prosecutor to explain the purpose of his questions, the answers he expected and their effect upon the case. The court was not obliged to hear argument. It might have retired to study the matter or have called a conference with counsel at the bench. Having consented to hear argument, the court could properly take steps necessary to avoid prejudicing either party. To protect petitioner, the jury was excused, as his counsel requested. To preserve the effectiveness of the cross-examination, petitioner was excused, as the prosecutor suggested, so that the accused should not gain advance information of the nature of the attack upon his credibility as a witness.

It is established by *Snyder* v. *Massachusetts*, 291 U. S. 97, that the right of presence is not so absolute, at least when the jury is out, as to preclude so fair a regulation of trial procedure. When a point of law is raised, the right of the defendant to be present depends on whether the possible advantage to him in his defense is outweighed, as it was in the instant case, by the certain prejudice to the public. Moreover, even if the question be approached with a view to determining what is part of the "trial," the result must be the same. As stated in the dissenting opinion in the *Snyder* case,

the "trial" in this sense is the submission of data to the jury that is to play its part in striking the balance between the accused and the Government. When conferences are held at the bench or in chambers, or when argument is had in the court-room outside of the hearing of the jury on questions of law, the "trial" is in effect recessed while the judge is considering his ruling, just as it would be if he retired to his library to study the point.

Nor was petitioner denied the assistance of counsel by this procedure. The court could not know in the absence of a request that consultation was desired, and no such request was made. But even if the court had foreclosed the possibility of any consultation that would disclose the direction the cross-examination was to take—which is the most extended interpretation that the record will bear—such a ruling would have been a proper regulation of trial procedure designed to preserve in its historic scope the effectiveness of cross-examination.

III

The inference which counsel impressed upon the jury during argument and which the judge permitted it to draw was not that petitioner's claim of the privilege against self-incrimination showed that he was guilty of another crime and therefore could not be believed. The inference was that petitioner's refusal to give relevant information showed that the answers would injure his case by proving that he received numbers payments in November

and December of 1937, an allegation which he had denied; therefore that he had testified falsely in making the denial.

It was not error to allow the jury to draw this inference. When petitioner took the stand he waived his privilege entirely and subjected himself to the rules applicable to any witness. If he had simply failed to answer pertinent inquiries, it would have been a proper subject of comment. The fact that his refusal was due to a claim of privilege erroneously allowed does not alter the right to comment on the refusal to answer. Any pressure to incriminate himself of the other crime was a foreseeable consequence of the initial decision to waive his privilege and take the stand. For petitioner knew that he would be questioned on all relevant matters. The court did not mislead petitioner by allowing him to claim his privilege. The court simply permitted him to refuse to answer and, under such circumstances, it could not be inferred from the allowance of the privilege that no adverse inference would be permitted to be drawn from the refusal to give pertinent information.

IV

Regardless of whether there was error in hearing argument in petitioner's absence during cross-examination or in permitting the jury to consider his claim of privilege against self-incrimination in determining his credibility, the judgment of con-

viction should be affirmed. It is familiar law that questions not raised in the trial court may not be assigned as grounds for reversal on appeal. Although exceptions to this rule have been recognized in criminal cases, especially where constitutional rights are at stake, we are aware of no instance in which the court has granted a new trial to a defendant who was represented by counsel, even for an alleged deprivation of his constitutional rights, where timely objection might have avoided the error and no unfairness occurred.

This principle forecloses petitioner's contention that there was reversible error in the charge. The instruction of which he complains was given after previous warning to counsel. Yet no objection was made at that time and no exception taken after the charge; the question was not raised until the argument before the circuit court of appeals. The instruction may have been favorable to petitioner and, since he acquiesced in it, he may not now complain.

Likewise, petitioner's conduct during the trial makes plain that he acquiesced in the procedure suggested by the trial court and waived whatever right he may have had to protest. Petitioner was represented by attorneys who vigorously defended him. They would have protested promptly if they had sensed unfairness or disadvantage in the suggestion that petitioner withdraw during the argument and return without consulting his attorneys

to learn what had occurred. Their acquiescence, first in the suggestion and then in the court's approval of it shows plainly that they believed the suggestion to be reasonable and did not wish to question it.

ARGUMENT

Introductory.—Petitioner has at no time questioned the sufficiency of the evidence to support the conviction. The proof of guilt was exceedingly strong. Petitioner admitted receiving $62,400 from the numbers syndicate in 1936 and $50,400 in the first ten months of 1937. The only issue before the jury was the truth of petitioner's testimony that the items "Commissions" on his income tax returns reflected the amount of numbers money remaining after political expenditures, and that he had in good faith supposed that he was not required to return the full amount received. He related an elaborate story of entering the balance of numbers money remaining each week on a slip of paper marked "income," which his secretary kept in a box, and of adding the amounts shown on the slips at the end of the year to reach the amount of the "Commissions" returned. On its face, this explanation was incredible. And the only witnesses whose evidence tended to corroborate it were impeached by reading their contrary testimony before the Grand Jury. On cross-examination, moreover, petitioner's own testimony

was shown to have been fabricated to meet the Government's proof. Information elicited from him established by unavoidable inference that he had received weekly payments in November and December 1937. Petitioner did not claim to have kept any record of that income, a fact which was inconsistent with his prior testimony for he had had no reason to abandon the system which he said that he had followed. The Government argued, and the jury apparently found, that the inconsistency was due to the fact that petitioner had fabricated his entire defense; until his cross-examination there was no suggestion in the proof that he had received money after November 1, 1937, and, therefore, he had prepared his defense to cover only the money received prior to that time.

The four errors now urged by petitioner grew out of a single sequence in this cross-examination. Petitioner discusses them as broad generalizations of law. We believe, however, that none of them can be separated from the cross-examination itself. The questions asked went to the heart of the proof, and petitioner's refusal to answer some of them by claiming privilege gave rise to a legitimate inference that he was unwilling to answer because the answers would show that his previous testimony and his defense were false. Likewise, the nature of those questions and the sequence of events lead-

ing up to the objection that interrupted his cross-examination at the critical point, made it appropriate to hear argument in his absence—the jury also being excused—and to deny him knowledge of what occurred so as to preserve the effectiveness of cross-examination; petitioner and his attorneys themselves evidently considered the procedure fair and proper at the time, for they acquiesced in it.

We shall not, therefore, discuss the four errors in the order in which petitioner presents them. Believing the logic of the facts to be critical, we discuss in Point I the facts concerning the cross-examination and show that there was no error in permitting the questions asked concerning petitioner's receipt of numbers money and accounting practices in 1938.

In Point II, we show that the nature of the cross-examination made it entirely fair and proper to require that he be absent from the argument; in Point II we also show that he was not denied the assistance of counsel by this procedure.

In Point III, we argue that the charge was proper on the inference to be drawn from petitioner's refusal to answer pertinent questions.

Finally, in Point IV we urge that even if error occurred in the procedure or in the charge, petitioner may not secure a second trial by questioning a fair and reasonable procedure in which he acquiesced at the trial, or by complaining of error in an instruction which he knew that the court intended to give and which he permitted to

be given without prior protest or subsequent exception that might have led to correction of any error.

I

THE COURT DID NOT ERR IN PERMITTING CROSS-EXAMINATION OF PETITIONER CONCERNING HIS RECEIPT OF MONEY FROM THE NUMBERS SYNDICATE IN 1938, AND HIS ACCOUNTING PRACTICES IN THAT YEAR

Before the petitioner took the stand as a witness in his own defense, it was established that the numbers syndicate made weekly payments of $1200 for protection against interference by the local authorities during part of 1935 and throughout 1936, 1937 and 1938 (R. 31–34, 59, Tr. 822–823, 973–975). Prior to November 1, 1937, Weloff and Towhey acted as agents for the syndicate in delivering the payments; they testified that the money was paid by them to petitioner (R. 43–47, 84–87). After November 1, 1937, Southern acted for the syndicate in delivering the payments; he testified, as a witness called by the court, that he had made the weekly payments not to petitioner but to Ferretti, a police inspector (R. 63). Since Ferretti was dead, it was not possible to inquire of him whether this was so and, if so, whether he paid the money to petitioner. The theory of the prosecution was that petitioner received *all* the weekly payments but had not reported them in his tax returns for 1935, 1936 and 1937 in order to evade the income tax; he was not indicted for 1938.

Petitioner's testimony on direct examination followed too precisely the prior proof. He admitted receiving the weekly payments of $1,200 from Weloff and Towhey, who had testified that they delivered the payments to petitioner until November 1, 1937 (R. 97, 105). He kept silent as to November and December 1937, although those months were in question; Southern had denied making the payments to petitioner during those months. Petitioner explained that he did not return the full amount of numbers money because he expended much of it for political purposes and because he believed that he owed a tax only on the amount which he retained (R. 109). His accounting practice, he said, was as follows: he recorded the balance of the weekly numbers payments on a slip of paper from a memorandum pad after subtracting any offsetting political expenditures; the slips were sent to his secretary for safekeeping; they were tallied in making up his income tax returns and then destroyed; and, finally, the total was entered in his returns under the heading "Commissions" (R. 106–107, 120–127).

This testimony left one obvious gap. Petitioner did not pretend in his direct examination that the amount reported in his 1937 return included any money received from the numbers syndicate in November or December of that year. Hence, proof that petitioner had continued to receive weekly payments during those months would establish his

guilt. Moreover, the implication of his testimony on direct examination was that he received none of the weekly payments of $1,200 made by the syndicate after November 1, 1937, because about that date Southern had succeeded Weloff and Towhey as "pay-off man." If it were shown that petitioner had received payments after that date, his credibility in the eyes of the jury would be damaged or destroyed.

Petitioner had said, moreover, that the item "Commissions" in his 1935, 1936, and 1937 returns was the balance of the weekly numbers payments remaining after deducting political expenditures. His 1938 return (the prosecutor knew) contained a similar item—"Other Commissions" (cf. R. 142). If petitioner had followed the same system in making his 1938 return as in the earlier years, he must have continued to receive the numbers payments in 1938. And if he received the regular weekly payments of $1,200 from the syndicate in 1938 after Southern had begun to deliver the money instead of Weloff and Towhey, just as he had received the same weekly payments in 1937 prior to November, was it not certain that he had received them in November and December also, and had attempted to deceive the jury by concealing that fact? The syndicate undoubtedly had made the weekly payments of $1,200 to someone during those two months. Clearly, therefore, it was logical to inquire along these lines. Since a con-

tinuous practice was involved, the answers would be material in any event in developing the credibility of petitioner's testimony concerning his extraordinary practice of recording on slips for income tax purposes the amount left over after political expenditures. And, if the defense were false, the entire structure would collapse. But the line of inquiry could not be expected to develop the truth from a witness who was untruthful and had learned from argument what questions would be asked and where they were directed.

The cross-examination to which petitioner objects pursued this line. After inquiry into petitioner's method of recording the numbers payments, the prosecutor asked how long petitioner kept up the practice and, after objection, brought out that petitioner followed the same course in 1938 as in the previous years (R. 126). The prosecutor then inquired, "Did you record $1,200 weekly each week in 1937?" The question was obviously fraught with most serious import. Petitioner's counsel precluded the effectiveness of the question. Apparently fearing the witness' answer, *counsel answered*. He said, "Until November 1st." He was reprimanded by the court (R. 129), but the witness had been given the answer. Further questions regarding November and December 1937 brought objections also helpful to petitioner as a witness and caused the court to rule (R. 129):

> You may have that exception and an exception to any question of a similar nature thereafter, but I do not think it is fair to raise it as a means of intimating to the witness—

In response to the questions, petitioner said that he recorded $1,200 weekly so long as Weloff received the money from the syndicate (R. 129). But he categorically denied receiving weekly payments in November or December from Southern who had become the syndicate's agent to make protection payments when Weloff stopped (R. 128–129).

The truth of petitioner's testimony on that issue then became the direct subject of attack along the lines explained above. Petitioner had said that he followed the same accounting system through 1938. He repeated that it was only the balance of the weekly payments from the numbers syndicate that had been recorded on memoranda slips and only the total of those slips that was represented by the item "Commissions" in his returns (R. 130). The next inquiry was "Did you receive any money from numbers in 1938?"; and petitioner, over objection, answered "Yes" (R. 130–131). The inference that petitioner had testified falsely concerning November and December was strong from that answer alone. There was no reason to suppose that the same syndicate which made regular weekly payments of $1,200 from 1935

until 1939, interrupted its continuous course of business for those two months to pay them to a different man than received them at all other times. The admission that payments were made in 1938 also went far to negate the petitioner's argument that such a change occurred on November 1, because on that date Southern commenced delivering the payments instead of Weloff and Towhey. But if it could be established that it was Southern who delivered the payments to petitioner in 1938, then even that loophole would be closed tight and the proof would be complete.

The critical question therefore was asked, "Who gave it to you?" (R. 131). Petitioner's counsel objected and asked for an opportunity to argue the point out of the presence of the jury. Argument was had, from which petitioner was absent. The court ruled that the questions were proper cross-examination but that petitioner could claim his privilege against self-incrimination if he wished, and suggested that his attorneys should advise him of his rights (R. 139).

Thereafter, the trial was resumed and the question, who paid petitioner the numbers money in 1938, was repeated. Petitioner's attorney, after a conference at the bench, then advised petitioner in open court that he had the right to refuse to answer questions which would tend to incriminate him of an offense for which he was not on trial. Although the question was relevant and material, petitioner

claimed privilege and was permitted to refuse to answer. (R. 140).

The following questions in the challenged line of cross-examination probed deeper into the inconsistency in petitioner's case. Petitioner repeated his assertion that he received numbers money in 1937 only until November 1st (R. 140). His income tax return for 1938 was then identified and attention was called to the item "Other Commissions" (R. 142–143). According to his previous testimony, this item could have reflected only the weekly numbers payments for he had sworn that this was true of his 1937 return and that in making up the 1938 return he had followed the same policy. The question was asked directly, what money was represented by the item in 1938, and the witness declined to answer on the grounds that he did not have his records present and that the answer would tend to incriminate him. The claim was sustained on the second ground (R. 143).

The logic and sequence of the trial, it is submitted, put beyond question the relevance and materiality of the cross-examination described above. The dissenting opinion below (R. 234–235) and petitioner's argument here (Br. 23–25) rest upon a misconception. There was no attempt to "impeach" petitioner's credibility by proving him guilty of another crime, or to lay a foundation for "impeachment" by calling witnesses to refute the answers. The inquiries were directed to issues on

trial, whether petitioner had in truth followed a "bookkeeping system" in recording numbers receipts and political expenditures, and, more particularly, whether he received unreported income in November and December 1937 which he had not included in his return and which at the trial he had attempted to conceal.

The cross-examination for those purposes was not rendered objectionable by the possibility that it would also impute to petitioner the commission of another crime. *Moore* v. *United States*, 150 U. S. 57; *Mehan* v. *United States*, 112 F. (2d) 561 (C. C. A. 8); *Cravens* v. *United States*, 62 F. (2d) 261 (C. C. A. 8), certiorari denied, 289 U. S. 733; *Weiss* v. *United States*, 122 F. (2d) 675 (C. C. A. 5), certiorari denied, 314 U. S. 687; *Shettel* v. *United States*, 113 F. (2d) 34 (App. D. C.); *Detoe* v. *United States*, 103 F. (2d) 584 (C. C. A. 8). See also authorities cited p. 42, *infra*. Furthermore, any prejudice from the imputation that he had committed other crimes was prevented by careful instructions to the jury to have no regard to the fact that petitioner's income was received from illegal enterprises, and to decide the case solely upon the issue whether petitioner sought to evade the tax on income received in 1935, 1936, and 1937 (R. 173-174, 187). Clearly, the cross-examination is not ground for reversal.

We turn, therefore, to the questions whether the procedure followed during the cross-examination or the charge which grew out of it requires that pe-

titioner be granted a second trial. We show, first, that no error occurred and, second, that if error did occur it is not ground for reversal.

II

PETITIONER WAS NOT ENTITLED TO HEAR THE ARGUMENT TO THE COURT UPON THE PROPRIETY OF THE QUESTIONS BEING ASKED HIM ON CROSS-EXAMINATION AND WAS NOT DENIED ANY RIGHT TO CONSULT WITH HIS ATTORNEYS CONCERNING WHAT OCCURRED

In the cross-examination of petitioner, the question, "Who gave you the numbers money in 1938?" was critical. Petitioner's admissions that he received payments weekly in 1935, throughout 1936, in 1937 until November, and then again in 1938, were damaging enough to his claim that in November and December of 1937 he received none, but the proof that petitioner had falsely testified would be overwhelming if Southern, the man who was delivering payments in November and December, were shown to have made payments to petitioner in 1938. (See pp. 19–24, *supra*.) Consequently, when counsel for petitioner objected to the question, the following colloquy occurred (R. 131):

> Mr. WINNE. I object to that, if your Honor please. I think perhaps we should have argument upon this question . . .
>
> The COURT. We will argue the point. Mr. Burns, you may argue it.
>
> Mr. BURNS. In the first place . . .

Mr. WINNE. Don't you think we should argue it out of the presence of the jury?

The COURT. Very well, I will excuse the jury. The jury may take a recess.

(The jury withdrew.)

Mr. BURNS. If the Court please, as long as the jury has left the room and is not present I am going to ask that the defendant also be excused from the court room during the argument, and that when he resumes the stand he should do so without having an opportunity to hear what the argument is about and I suggest that he remain in the outer office of the chambers of Judge Avis during the argument.

The COURT. I think that is a fair request. You may retire, Mr. Johnson.

(The defendant withdrew.)

The reasonableness of the request is plain. In order to rule on counsel's objection the court desired light on the relevance and competence of the line of inquiry. He could have retired to study the matter; he could have called counsel to the bench or invited them to his chambers, recessing the trial. Petitioner had no right to have the question argued at all, but since it was to be argued, it was appropriate to regulate the procedure so as to be fair to both the petitioner and the public. Argument upon the relevance and competence of the inquiry would call upon the prosecutor to disclose what questions he would ask, their purpose and the effect of the answers. Counsel for petitioner accordingly

desired the jury to be absent. At his request the jury was excused. For petitioner, then on the stand, to hear this argument would have been grossly inconsistent with the historic purpose of cross-examination. It would have enabled him to meet what he would have been openly advised by the prosecutor was the attack. Moreover, there was already reason to believe that his testimony on direct examination and his answers on cross were fabricated to meet the occasion, and his attorney had already intervened to coach him in such a way as to preserve the fabrication. (See p. 22, *supra*.)

On the other hand, there was no reason for the defendant's presence. When he withdrew the only question before the court was whether it was proper to ask him, who paid the numbers money which he received in 1938. There was no reason for the court to suppose that petitioner could assist his attorneys to argue the point or that the defense would be impeded by his absence. There is no claim, even after the event, that petitioner suffered any prejudice by his absence. The only injury suggested (Br. 14) is that "petitioner could have advised, made suggestions or even superseded his lawyer." The court was not bound to give weight to so theoretical a possibility.

A fair appraisal of the situation at the time, therefore, must have indicated to the court that, if argument by counsel was desirable, the argument

should be out of the presence of both the jury and the petitioner. It is plain, too, that petitioner and his attorney acquiesced in this appraisal. No objection was raised when the prosecutor made the suggestion or when the court approved it.

The ensuing argument, moreover, bears out this analysis and shows that nothing occurred calling for petitioner's presence. The prosecutor explained, much as we have done, the logic of his attack on the petitioner's credibility and emphasized that his questions related directly to the last two months of 1937, when, as in 1938, Southern was making protection payments on behalf of the numbers syndicate. Petitioner's attorney argued first that the questions went beyond the scope of direct examination. Then, he shifted his ground and argued that the questions were objectionable because they related to a possible crime committed in 1938, which was not covered by the indictment. At no time did petitioner's attorney suggest that he wished to consult petitioner or that he was hampered by petitioner's absence. (R. 132–139.)

The court ruled that the questions were proper cross-examination but that petitioner could claim his privilege against self-incrimination if he wished, and suggested that his attorneys should advise him of his rights (R. 139). When the trial was resumed, petitioner's attorney, after a conference at the bench, advised petitioner in open court that he had the right to refuse to answer

questions which would tend to incriminate him of an offense for which he was not on trial. At no time was the court requested to permit petitioner and his attorneys to confer upon the advisability of claiming the privilege. (R. 140.)

Notwithstanding his acquiescence at the trial, petitioner now challenges the above procedure upon two grounds; he contends (a) that he was denied his constitutional right to be present at the trial, and (b) that he was deprived of the effective assistance of counsel. The argument does not question the fairness of the procedure and the want of prejudice. Rather, it is said that the Court will presume injury if a constitutional right was denied. This begs the whole question, because the fairness and propriety of what occurred is decisive of the constitutional issue. The right of presence is not so absolute—at least when the jury is out—that there may not be circumstances, as in the instant case, permitting argument of law in the defendant's absence. Likewise, petitioner's right to consult with counsel in order to render his assistance effective, even if he had requested the opportunity, would not have included the right to interrupt the cross-examination for consultation to suit his convenience as a witness. To hold otherwise would, it is submitted, convert rights intended to secure a fair trial into mechanical formulae for evading the normal purpose of cross-examination.

A. THE RIGHT TO PRESENCE

The right of a defendant to be present at his trial is not found in any express constitutional provision similar to the guarantees of jury trial, assistance of counsel, and confrontation of the witnesses. The right of presence derives from the right to a fair trial according to due process of law. Presence is ordinarily so intimately related to an opportunity to defend that it has often been said to be a general rule that (*Schwab* v. *Berggren*, 143 U. S. 442, 448)—

> The personal presence of the accused, from the beginning to the end of a trial for felony * * * may be, and must be assumed to be, vital to the proper conduct of his defence, and cannot be dispensed with.[1] * * *

But the general rule does not obscure the basic principle. Although it is not ordinarily required, there may be occasions when the presence of the defendant at the argument of a preliminary motion, or even at the hearing on appeal, would be essential to due process even though the "trial" is over, or has not begun. Conversely, the general rule is not to be so mechanically applied as to require the presence of the defendant at all times and under all circumstances from the moment the jury is impanelled until the verdict has been returned. Since the aim is to secure fairness, the

[1] Similar generalizations are quoted or cited in petitioner's brief, pp. 10–12.

question becomes, it is submitted—at least when points of law are being argued and the jury is absent—whether the possibility that the defendant's presence may legitimately aid his defense is outweighed by some danger that he will gain only an advantage denying the public its right to have the issue fairly tried.

The constitutional validity of this position is established by *Snyder* v. *Massachusetts*, 291 U. S. 97. There it was held that a state did not deny due process by permitting the jury to view the scene of the crime in the defendant's absence, even though counsel pointed out what they wished the jury to observe and the view was to be weighed as evidence. A majority of the Court concluded that Snyder's presence or absence during the view bore no "relation, reasonably substantial to the fullness of his opportunity to defend against the charge (pp. 105–106)." *A fortiori*, due process does not secure the absolute right to be present at every argument of questions of law.

Petitioner seeks to distinguish the *Snyder* case on the ground that the view was not thought to be part of the "trial" and argues that the argument of questions of law in the absence of the jury must be regarded as part of the trial (Br. 12–13).* But

* We can see no basis whatever for petitioner's argument that in the *Snyder* case the Court reserved decision expressly on the question here involved. The passage quoted (Br. 13) deals with the submission of evidence to the jury and points out that even then the right of presence may not be inflexible.

the opinion of Mr. Justice Cardozo makes it clear that the decision did not rest on formal grounds or verbal definitions (see especially, 291 U. S. at 114–115). Moreover, for reasons stated below it is clear that argument of questions of law are not part of the "trial," as that term is used in stating the general rule concerning the right of presence.

The accepted rule governing proceedings before the jury is impanelled and motions after verdict also gives point to the view that a defendant has no absolute right to be present at argument of questions of law even though the jury has withdrawn. It is settled that due process does not always require the defendant's presence during proceedings before or after trial. *Snyder* v. *Massachusetts*, 291 U. S. 97, 107, 129; *Dowdell* v. *United States*, 221 U. S. 325, 331–332; *Schwab* v. *Berggren*, 143 U. S. 442, 449; *United States* v. *Cox*, 47 F. (2d) 988 (C. C. A. 5); *Alexis* v. *United States*, 129 Fed. 60 (C. C. A. 5); *United States* v. *Mahoney*, 43 F. Supp. 943 (W. D. La.). No essentially different problems are involved when the legal points are raised and argued after the jury has been impanelled but before the verdict is returned. Plainly, the point of time is irrelevant. The judge's ruling may be as important in the one case as in the other. The defendant's ability to assist in the argument will vary with the question presented and not with the time at which it is raised.*

* We are aware of no federal cases dealing with the precise issue. A few state cases dealing with the point have held

The approach followed in the dissenting opinion in the *Snyder* case would likewise lead, if followed in the instant case, to the conclusion that this petitioner was not denied his constitutional rights. The dissenting opinion, like that of the majority, bases the right of presence on the requirement of fundamental fairness (291 U. S. 128, 130) but it appears to accept unqualifiedly the general statement that a defendant has the right to be present throughout the "trial." The critical inquiry was said to be whether the view was "a part of the process of submission of data to the triers of fact," was "to play its part with oral testimony and written evidence in striking the balance between the state and the prisoner," and so was part of the "trial". (291 U. S. at 134). The implication is plain that if the answer is negative, then the proceeding is not part of the "trial" and the defendant's presence is not inflexibly required.

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that the defendant's presence at argument to the trial court is required. All of these decisions have arisen, however, under express statutes requiring the defendant's presence during the trial. *Adams* v. *State*, 28 Fla. 511, 10 So. 106; *State* v. *Sutter*, 71 W. Va. 371, 76 S. E. 811; *Lee* v. *State*, 161 S. W. (2d) 290 (Tex.); *Brooks* v. *State*, 77 Tex. Cr. R. 517, 179 S. W. 447. But cf. *State* v. *Hall*, 53 Mont. 182, 173 Pac. 267; *Palmer* v. *Commonwealth*, 143 Va. 592, 130 S. E. 396; *Haycod* v. *Commonwealth*, 157 Va. 918, 162 S. E. 10, 601; *Zimmerman* v. *Commonwealth*, 167 Va. 578, 189 S. E. 144; *State* v. *Maxwell*, 131 Kan. 951, 102 P. (2d) 109. *Fuller* v. *State*, 96 Ga. 430, 23 S. E. 825, cited by petitioner will be found on closer examination to involve argument by counsel to the jury and not argument to the court on points of law.

Judged by this test, it is clear that the argument of law in the instant case was not part of the "trial." The judge might have ruled at once on the objection or have retired to review the stenographer's notes and investigate the applicable precedents. He might have called counsel to the bench or have invited them to his chambers. Objections are dealt with daily by such methods but it has never been suggested that they deny the defendant the constitutional right to be present at his "trial." Nothing different in essence occurred in the instant case. In effect, by this, as by similar procedures, the "trial" was recessed while the court advised itself on the law with the assistance of counsel.

Up to this point we have discussed the right of presence as it were exclusively one of constitutional law. In fact, the practice to be followed under the common law rules prevailing in the federal courts may well be stricter in a defendant's favor than the Constitution required. Cf. *Frank* v. *Mangum*, 237 U. S. 309, 341. For example, in the exercise of its power to fix the practice in criminal cases in the federal courts (cf. *Funk* v. *United States*, 290 U. S. 371) this Court might develop a rule that the defendant should be permitted to be present whenever no reason for excluding him appeared, even though his presence on any particular occasion while the jury was absent might have no apparent relation to his opportunity to defend against the charge. But *cf.*

American Law Institute, Proposed Code of Criminal Procedure § 289. But there is no reason here to deal in generalizations; the issue concerns only the procedure followed in this particular case and not a ruling that a defendant may always be excluded from argument upon questions of law. Cf. *Snyder* v. *Massachusetts*, *supra*, at p. 115. In the trial court the question was whether, in the case of a defendant who did not ask and had no apparent reason to be present, the possibility that he would be made easier in his defense outweighed the certainty that the effectiveness of critical cross-examination would be diminished. For him to be present would interfere with a traditional means of eliciting truth. For him to withdraw during the argument together with the jury would not differ intrinsically from the common practice of discussing objections in conferences at the bench out of the hearing of the jury, the witness and the defendant. There can be no doubt under these circumstances, it is submitted, that the action of the trial court was correct.

B. THE RIGHT TO COUNSEL

Petitioner asserts throughout his brief that he was denied the right to confer with counsel concerning whether to claim the privilege against self-incrimination (Br. 3–4, 6, 20, 22, 25–26). The assertions are plainly not consistent with the record. No request for an opportunity for consultation was made at any time. Nor is it fair to say that the

judge had already ruled that no conference concerning the privilege could be held, or that petitioner's attorneys were foreclosed from making such a request by the earlier comment (Br. 22). The suggestion that the privilege might be claimed was made for the first time during the argument on whether the cross-examination was within the scope of the direct (R. 135–136). This was after petitioner's withdrawal. Petitioner's attorney continued to argue that the question was objectionable regardless of the privilege of the witness, and did not ever ask to confer with petitioner concerning the privilege. The court itself suggested twice to petitioner's attorney that he might advise petitioner of his rights and, in open court, after an unreported conference between court and counsel at the bench, his attorney explained the privilege to petitioner. (R. 135–143). Certainly, the court performed its duties fully by twice suggesting to petitioner's attorney that he might advise petitioner "about his rights" and by allowing him to give the only advice which he expressed a desire to communicate.

There is also some suggestion that the court denied petitioner the constitutional right to the assistance of counsel by hearing the argument on the objection to the cross-examination in petitioner's absence and then resuming the trial without affording an opportunity for consultation concerning what had occurred. But surely the court

was not required to read the mind of petitioner or his attorneys and discover that they wished to confer. Indeed, no suggestion that the opportunity to confer had been denied was made until after the decision of the circuit court of appeals. While the trial court characterized as fair the prosecutor's suggestion that petitioner should resume the stand without learning what occurred in the argument, its only direction to petitioner was that he should leave the room (R. 132). A request for an opportunity to consult was necessary to bring the question before the court and, in the absence of such a request, there was nothing to deny.

But if it be assumed *arguendo* that the court in effect denied petitioner the right to have his attorneys relate to him, before he resumed the stand, what occurred in the argument during his absence, nevertheless the result must be the same. Where a defendant has, as here, the full assistance of counsel, a request to interrupt or postpone the trial for a conference presents a procedural question to "be decided by the trial judge in the light of facts then presented and conditions then existing" *Avery* v. *Alabama*, 308 U. S. 444, 446). The considerations which made it reasonable to ask that the court hear argument in petitioner's absence likewise made it reasonable for the prosecutor to suggest that petitioner, when under cross-examination, should not be informed by the attorneys of his disclosures of his intended line of inquiry—disclosures the sole purpose of which was to

aid the court in ruling on the propriety of the questions.

Cross-examination is an old and vital part of the administration of justice. It is potent in eliciting the truth. It may not be rendered ineffectual by interruptions for conference with counsel concerning the questions asked. Such a procedure would test the tactical skill of opposing counsel but not the truth. No impairment of a defendant's rights results from maintaining cross-examination in its historic and essential place in a trial. A defendant may discuss his defense with his attorneys at other times. The decision to submit to cross-examination is made when the defendant takes the stand in his own defense. He is not obliged to become a witness and to subject himself to rules governing ordinary witnesses. Cf. *Raffel* v. *United States*, 271 U. S. 494. When he decides to do so, he has no need of assistance of counsel in order to tell the truth, and certainly he is not entitled to opportunity then to consult as to the answers.

III

THE TRIAL COURT DID NOT ERR IN PERMITTING THE JURY TO CONSIDER, IN DETERMINING PETITIONER'S CREDIBILITY, HIS REFUSAL TO ANSWER RELEVANT QUESTIONS ON THE GROUND THAT THE ANSWERS WOULD TEND TO INCRIMINATE HIM

In his closing argument the prosecutor emphasized the inconsistencies developed by the cross-examination of petitioner (See pp. 19–26, *supra*).

He pointed out that petitioner admitted receiving the numbers money in 1937 until November, that he was also shown to have received numbers money in 1938, and that there was no explanation of petitioner's avowal that he received no payments in the intervening two months, although it was not denied that the numbers syndicate disbursed the regular weekly amounts for protection. It was incredible, the prosecutor argued, that petitioner spoke the truth when he denied receipt of payments in November and December, and he went on to contend that petitioner claimed the privilege against self-incrimination in order to withhold information from the jury which showed that his evidence was not to be believed (R. 167–168).

In the course of this argument, the prosecutor stated, as if quoting petitioner, that petitioner had admitted violating the income tax law in 1938 by claiming his privilege against self-incrimination (R. 167). When petitioner's attorneys subsequently objected to this argument, the court suggested that he would indicate to the jury, first, that petitioner had made no such admission as the prosecutor had seemed to quote, and second, that he would limit the jury's consideration of the claim of privilege to its bearing on petitioner's good faith and credibility. Petitioner neither indicated that this course was not satisfactory to him nor asked the court to do more (R. 171). Accordingly, the court gave the instruction of which complaint is

now made (R. 173) and also charged the jury not to consider evidence concerning 1938 except as it related to previous years (R. 174). Petitioner, although he called attention to other parts of the charge, did not take exception to this instruction (R. 195–199). The case then went to the jury. In the circuit court of appeals, he asserted for the first time that the instruction was error.

Petitioner concedes that if the sequence of cross-examination was proper, the claim of privilege should probably have been disallowed (Br. 27–28). Clearly, this is the rule. A defendant is not required to take the stand and no adverse inference may be drawn if he fails to do so. *Bruno* v. *United States*, 308 U. S. 287. When he elects to testify, however, the prosecutor may cross-examine "with the same latitude as would be exercised in the case of an ordinary witness, as to circumstances connecting him with the crime" (*Sawyer* v. *United States*, 202 U. S. 150, 165–166). *Powers* v. *United States*, 223 U. S. 303; *Raffel* v. *United States*, 271 U. S. 494. And if the inquiries are relevant to the charge, a defendant may not refuse to answer on the ground that the answers will also tend to prove him guilty of another crime. *State* v. *Wentworth*, 65 Me. 234; *Commonwealth* v. *Nichols*, 114 Mass. 285; *People* v. *Dupounce*, 133 Mich. 1; *State* v. *Klitzke*, 46 Minn. 343; *State* v. *Ober*, 52 N. H. 459; *State* v. *Bailey*, 27 N. M. 145; *State* v. *Griffin*, 201 N. C. 541; *State* v. *Kent*, 5 N. D. 516.

Petitioner contends, however, that it was a perversion of the privilege to allow him to claim it and then to allow the jury to draw an adverse inference from the claim (Br. 25–26). The argument, it is submitted, misconceives the inference which was permitted to be drawn. The questions concerning 1938 were not asked to impeach petitioner by proving him guilty of a collateral crime. They were asked and were admissible to show that petitioner had followed in 1938 (if he had followed at all) a "bookkeeping system" practiced by him in 1937 for recording weekly payments of numbers money; that he had received the same weekly payments in 1938 which he had admitted to receiving in the first ten months of 1937 and that therefore (it would be argued) he must have received payments in November and December 1937 which he had not reported and about which in his previous testimony he had not told the truth. (See pp. 19–24, *supra*.) The inference which the prosecutor urged, and which the trial court permitted to be drawn, was not that petitioner claimed the privilege against self-incrimination and therefore could not be believed, because he admitted another crime. The inference argued to the jury was that petitioner would have answered the questions concerning 1938 if the answers would have helped his case and that he must have withheld the information because, if given, it would show that he received the weekly numbers payments regularly after Southern became "pay-off man"

and therefore must have received them in November and December (R. 167–168, 173–174).

Likewise, it is incorrect to suggest that the court misled petitioner by allowing him to claim the privilege. The ruling gave neither petitioner nor his attorneys any reason to suppose that no adverse inference would be drawn from his refusal to give pertinent testimony. As a matter of law, it does not follow from allowance of a claim of privilege that the prosecutor may not comment upon the fact that the defendant, who has taken the stand, is unwilling to make his evidence complete. Eminent authorities have urged that the sound practice is to permit both the claim and the comment on the silence, just as was done in the instant case. Cooley, *Constitutional Limitations* (3d ed.) p. 317. And as a matter of fact, petitioner, if he weighed his decision at all, must have taken into account the probability that the jury, whatever the comment by prosecutor or judge, would draw an adverse inference from the claim.

Undoubtedly, his silence would have been a proper subject of comment if petitioner had simply failed to explain the apparent inconsistency between his avowals that he received no numbers money in November and December (although admitedly payments were made) and his apparent receipt of the weekly payments before and after that time. In *Caminetti* v. *United States*, 242 U. S. 470, the Court held, p. 494:

> * * * where the accused takes the stand in his own behalf and voluntarily testifies for himself * * * he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

Accord: *Raffel* v. *United States*, 271 U. S. 494, 497; *Reagan* v. *United States*, 157 U. S. 301, 304–311; *Krotkiewicz* v. *United States*, 19 F. (2d) 421 (C. C. A. 6). The rule would apply *a fortiori* where the defendant, without explanation refused to answer inquiries concerning such facts.

Petitioner suggests no reason why a different rule should govern when the refusal to answer relevant and material inquiries is based upon his claim that the answers would be incriminating with respect to another crime, evidence of which would be admissible (see p. 26, *supra*). Plainly, none of the considerations which have led to prohibition of comment upon a defendant's failure to take the stand* are applicable here, and the cases cited by petitioner (Br. 26–27) therefore are not in point. We can conceive no policy requiring such a qualification of the rule that accused waives his privilege completely by becoming a witness in his own behalf. On taking the stand, he voluntarily assumes the

* See VIII Wigmore, *Evidence* (3d ed.), §§ 2272, 2272a.

burden of a full explanation of matters material to the charge, with the consequence that an adverse inference will be drawn from any failure to explain. He knows that he will be asked questions about apparently relevant facts even though they may tend to incriminate him of another crime. Any adverse inference from a later claim of privilege, therefore, is a foreseeable consequence of the original choice and is avoidable by electing not to testify. Cf. Wigmore, *op. cit. supra*, § 2276 (2d). "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness." *Raffel* v. *United States*, 271 U. S. 494, 499. The defendant has ample protection against irrelevant questions which tend to incriminate him of another crime in the right to object and have the evidence excluded on that ground.

The authorities accord with our position. In *State* v. *Ober*, 52 N. H. 459, an identical charge to the jury was held proper under almost precisely parallel facts. In that case comment by prosecution and by the court followed a claim of privilege against cross-examination concerning times outside the scope of the prosecution's direct evidence but within the scope of the general charge. The decision was approved in *Fitzpatrick* v. *United*

States, 178 U. S. 304, 315–316. And in VIII Wigmore, *Evidence* (3d ed.), § 2273 (4), it is said

> Furthermore, where the party refuses answer and claims privilege as to the matter which is in truth included in the waiver, but the answer is *not insisted upon*, the inference is of course available. * * *

The decision upon which petitioner relies (Br. 27) is inapplicable since it involved an ordinary witness having no privilege to refuse to take the stand in the first instance.

IV

THE JUDGMENT OF CONVICTION SHOULD BE AFFIRMED REGARDLESS OF WHETHER THERE WAS ERROR IN HEARING ARGUMENT IN THE PETITIONER'S ABSENCE DURING CROSS-EXAMINATION OR IN PERMITTING THE JURY TO CONSIDER PETITIONER'S CLAIM OF PRIVILEGE AGAINST SELF-INCRIMINATION IN TESTING HIS CREDIBILITY

It is familiar law that questions not raised in the trial court may not be assigned as grounds for reversal on appeal. The rule is based upon considerations of fairness to the courts and the parties and upon the desirability of ending controversies in the trial courts so far as possible by requiring that all issues be presented to them in the first instance. *United States* v. *Atkinson*, 297 U. S. 157, 159. Exceptions to the general rule have been recognized where the error could not have been avoided and the conviction obtained,' or where the error was substantially pointed out although no

precise exception was saved.[7] Also, the Court is reluctant to find a waiver of constitutional rights and will not hold that a defendant who had no counsel and cannot be presumed to have known his rights, waived procedural guarantees of the Bill of Rights merely by failure to assert them.[8] But we are aware of no instance in which the Court has awarded a new trial to a defendant who was represented by counsel, even for an alleged deprivation of his constitutional rights, where timely objection might have avoided the error and no unfairness occurred. For in such a case the general rule is further enforced by consideration of the disrespect for criminal procedure, and even for fundamental constitutional rights, which would result from permitting a defendant to obtain one verdict by acquiescing in avoidable error and then pointing to the error to secure a new trial after the first verdict went against him. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238–239. We submit that the instant case is governed by the general rule.

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[7] *Wiborg* v. *United States*, 163 U. S. 632, 658 (failure to move for directed verdict); *Clyatt* v. *United States*, 197 U. S. 207, 221–222 (failure to move for directed verdict); *Weems* v. *United States*, 217 U. S. 349, 362 (statute unconstitutional because minimum punishment cruel and unusual); *Brasfield* v. *United States*, 272 U. S. 448 (inquiry as to division of jury).

[8] *Crawford* v. *United States*, 212 U. S. 183, 194; *Burns* v. *United States*, 274 U. S. 328, 340–341 (dissenting opinion).

[9] *Johnson* v. *Zerbst*, 304 U. S. 458, 465.

A. THE RIGHT TO PRESENCE AND TO ASSISTANCE OF COUNSEL

Despite earlier *dicta*,[10] it is settled that the right of presence may be waived, either expressly or by a failure to assert it at the appropriate time. *Diaz* v. *United States*, 223 U. S. 442, 453–459; cf. *Frank* v. *Mangum*, 237 U. S. 309, 338–343; *Gaines* v. *Washington*, 277 U. S. 81; *Snyder* v. *Massachusetts*, 291 U. S. 97, 106, 134–135. The assistance of counsel may also be waived by a defendant conscious of the right. *Johnson* v. *Zerbst*, 304 U. S. 458, 464–465. *A fortiori* a defendant who has counsel may forego his right to assistance so far as it turns upon consultation by his own and his attorney's failure to ask for the opportunity to consult.

Petitioner's conduct during the trial makes plain that he acquiesced in the procedure suggested by the trial court and waived whatever right he may have had to protest. Argument on the propriety of cross-examination while he and the jury were absent was not different intrinsically from the daily practice of arguing questions at the bench out of the hearing of the jury and the defendant. Moreover, in the circumstances here, that course was necessary to preserve the effectiveness of the cross-examination (see pp. 27–30 *supra*). Petitioner was represented by attorneys who vigorously defended the case. They would have pro-

[10] E. g., *Hopt* v. *Utah*, 110 U. S. 574, 578.

tested promptly if they had sensed unfairness or disadvantage in the suggestion that the petitioner withdraw during the argument and return without consulting his attorneys to learn what occurred. Their acquiescence in what occurred shows plainly that they wished to raise no question about it.

Petitioner now relies chiefly upon *Johnson* v. *Zerbst*, 304 U. S. 458, and *Glasser* v. *United States*, 315 U. S. 60, to show that his acquiescence in the procedure at the trial does not bind him on appeal. The *Johnson* case is not in point. The Court there held that no waiver occurred because the trial court had not advised a defendant who had no attorney that counsel would be appointed to represent him if he so desired: "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, *in which the accused • • • is without counsel*" (p. 465). [Italics supplied.]

Likewise, the *Glasser* case is not contrary to our position. In that case the majority concluded that the trial court had impaired Glasser's rights by pressing the suggestion that Glasser's attorney should also represent a co-defendant with conflicting interests, after Glasser had once voiced his opposition to the plan. In the instant case neither petitioner nor his counsel ever expressed a desire that petitioner hear the argument of law. And it seems somewhat unrealistic to suppose, as petitioner would have the Court do (Br. 22), that he

was compelled to submit to the "order" [14] because protest would be futile. The so-called "order" was only the comment in answer to the prosecutor's unopposed suggestion, "I think that is a fair request. You may retire Mr. Johnson" (R. 132)."

We need not rely, however, on the waiver alone. There may be a duty resting upon a trial judge to inquire into "unreasonable or undue departures" from normal trial procedure even though the defendant is represented by counsel attentive to his rights. Cf. *Patton* v. *United States*, 281 U. S. 276, 312–313; *Glasser* v. *United States*, *supra*, at p. 50. No such question is presented here. The procedure was a sound way to maintain the effectiveness of cross-examination. It does not differ from the customary conference between court and counsel at the bench. It created no risk of prejudice to petitioner. It is not suggested that he was able to add to the argument of the question mooted in his absence, and we perceive no way in which he might have later been easier in his defense if he had been present, except by learning what questions would be asked him—an advantage to which he was not entitled when actually under cross-examination.

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[14] Br. 18.

[15] There is a second distinction between the *Glasser* case and the instant case. In the *Glasser* case the question was whether Glasser had the effective assistance of counsel at all in his trial or whether he was deprived of it by the appointment of his attorney to represent a co-defendant with conflicting interests. No such question is involved here where the point is whether the absence of consultation at a particular moment in the trial vitiates the trial.

It is submitted therefore that petitioner may not now attack the procedure in which he acquiesced. If he had objected, the error, if any, might never have occurred. The trial, including the procedure challenged, was in all respects fair and the proof of guilt overwhelming. Even were it true that he had a legal right to a different procedure, if he had asserted it, he should not now secure a second trial by its belated assertion after accepting the risk of what the verdict would be without its assertion.

B. THE CHARGE

It is clear, we submit, that the above principle also forecloses petitioner's contention that there was reversible error in the instruction given to the jury that, in determining petitioner's credibility, it might weigh his claim of privilege not to answer relevant questions on cross-examination on the ground that the answers would tend to incriminate him. The instruction was given after previous warning to counsel in order to cure any harm done by an improper statement in the prosecutor's closing argument (see pp. 40–42 *supra*). Petitioner had made no prior requests for a charge on this subject which were refused. At the conclusion of the charge his attorney took exceptions on several points and the court gave additional instructions in response to certain of the objections raised. No objection was made or exception taken to the portion of the charge dealing with the inference from

the claim of privilege (R. 195–199). No error was asserted on this ground in the motion for a new trial, in the grounds of appeal, or in the assignments of error (R. 199–200, 205–214). The point was first raised in argument before the circuit court of appeals.

There is particular reason to invoke the general rule in the instant case. It is commonly believed that a jury may take into account and draw adverse inferences from any claim of the privilege against self-incrimination. The claim in the instant case must have implanted itself firmly in the jury's mind because it was made at one of the crises in the trial to escape a decisive question. At the trial petitioner's attorneys might well have concluded that the jury would not remove the incident from their minds even if the judge so charged them, but that the incident might be minimized by the instruction limiting any adverse inference to the matter of credibility.

Petitioner is therefore in the position of asserting error to an instruction which might have aided him, even though he objected to the closing statement exclusively on another ground, accepted the substance of the instruction suggested by the court, and then failed to object to it after it was delivered within a time which would have permitted the court to correct any possible error. Under the circumstances, he may not now complain. *United States* v. *Manton*, 107 F. (2d) 834, 846–848 (C. C.

A. 2), certiorari denied, 309 U. S. 664; *Boyd* v. *United States*, 271 U. S. 104; *Wong Tai* v. *United States*, 273 U. S. 77, 83; *United States* v. *Buckner*, 108 F. (2d) 921, 928 (C. C. A. 2), certiorari denied, 309 U. S. 669.

CONCLUSION

It is respectfully submitted that the trial was fair, that the conviction was proper and that accordingly the judgment below should be affirmed.

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